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File No. O.E.P Whipping / 42

Legal **DEPARTMENT**

A **BRANCH**

(P.17 E)

Subject:— Opinions Under

The Bombay (Emergency Powers)

Whipping Act 1941

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Submitted.

The question raised for the R.L.A's consideration is whether the power conferred upon the Provincial Govt. under section 2(2) of the Bombay (Emergency Powers) Whipping Act, 1941. to notify that the provisions of section 3 of the Act shall come into force in a particular area includes the power to denotify and terminate the operation of the section in such area.

2. Sub-section (2) of section 2 of the Bombay (Emergency powers) Whipping Act, 1941, inter alia provides that the Provincial Govt. may, by notification in the Official Gazette, direct that section 3 shall come into force in such area and from such date as may be specified in such notification. It is evident that Government is empowered to apply the provisions of section 3 of the Act in a particular area by issuing a notification in that behalf. Section 21 of the Bombay General Clause, Act, 1904, provides that where, by any Bombay Act, a power to issue notifications, orders, rules or by -laws, is conferred, then that power includes a power exercisable in the like manner and subject to the like sanction and conditions (if any) to add to, amend, vary or rescind any notification orders, rules or by-laws so issued. Under section 2(2) of the Bombay (Emergency Powers) Whipping Act, 1941, read with section 21 of the Bombay General Clauses Act, 1904, the power to issue a notification applying the provisions of section 3 of the Act to a particular area includes also the power to denotify or rescind such notification by means of notification whenever the emergencies are over. It will not, therefore, be necessary to under tak amendment of the Bombay (Emergency Powers) Whipping Act, 1941.

sd/- 1/9

As.

I agree.

Power to issue a notification under section 2(2) of the Bombay (Emergency Powers) whipping Act, 1941 applying the provisions of section 3 to a certain local area includes power to cancel such notification (see section 21 of the Bombay General Clauses Act, 1904 . It is not therefore necessary to amend the Act for the purpose.

Sd/- R. TK.
3/9

A.S.R. I agree.

Reply may be A.S's note as slightly revised.

sd/- R.S.H.
2/9

R.L.A. Sd/- P.N.M
9/9

U.O.R. to M.D. No.7601 dated the 21st September 1942.

It appears that D.S. doubts the correctness of the R.L.A'S opinion in this case. He has called my attention to the R.L.A's opinion No. 5883, dated 28-6-1940 and sec. 19 of Crawford's Construction of Statutes. Since the point involved is of great importance and likely to arise frequently, it appears desirable to reconsider the case.

2. Crawford in sec.19. of his Construction of Statutes: "Closely akin to, if not a part of the power to ascertain facts upon which the operation of a law is to depend, is the power to issue a proclamation declaring a specified enactment to be henceforth, or from a given date, in effect. The same is true with the power to suspend the effectiveness of a given legislative act. Both of these powers if they be considered separate powers are frequently delegated to the executive. The power to proclaim the effectiveness of a law is sustained by virtue of the general rule that a law does not necessarily have to take effect after it leaves the legislature but its effectiveness may be made to depend upon the happening of some future event or contingency. One of these contingencies is the voluntary act of some designated person or officer. It may be the issuance of a proclamation by the executive. Upon this same reasoning the executive or an administrative board may be authorized to suspend the operation of a statute by a proclamation, although the power to suspend law is vested solely in the legislature. But the suspension by the executive or by the administrativ board must be based upon some condition, contingency or state of facts, declared by the legislature in the enactment to be sufficient to warrant the suspension by the executive. Such an authorization is not considered a delegation of legislative power

since nothing is left to his determination which involves the expediency or just operation of the legislation". Crawford is an American author and the aughorities quoted by him are American authorities. ~~It is not known whet~~ It is not known whether the American Statute Book contains a provision similar to sec. 21 of the General Clauses Act, 1897, since his statement quoted above is subject to the qualification that both of these power i.e. power to proclaim ~~and power to suspend the effec~~ ~~to proclaim~~ and power to suspend the effectiveness of an enactment are considered as separate powers. Consequently if sec. 21 of the General Clauses Act is construed as providing for both of these powers, power to proclaim the effectiveness of an Act being impliedly inclusive of power to suspend its ~~operation~~, operation, then a separate provision for suspending the operation of an Act would be unnecessary.

3. In putting up any previous note in this case I relied upon the commentary below sec.21 of the General Clauses Act at p. 97of the Govt. Publication which is as follows:- "Many orders are made by ~~xx~~ notification e.g. orders enacting an enactment under se c. 5 of the Scheduled Districts Act, 1874 (XIV of 1874), and the question frequently arose whether these would be covered by this section. The view taken by the Legislative Deptt. was that the section as it stood before amendment by Act I of 1903 probably referred to orders of a legislative character. As amended it expressly covers notifications as do similar provisions in local General Clauses Act". (Se c. 21 of the Bombay General Clauses Act corresponds with se c. 21 of the General Clauses Act, 1897).

It is therefore clear that a notification extending an Act to a certain area falls under se c. 21 of the General Clauses Act and it can be cancelled even in the absence ~~xx~~ of any statutory power for the purpose. The power to suspend the operative action of proclamations in respect of statutes is considered to be a delegated statutory authority. Thus, the Foreign Enlistment Act, 1870 (33 & 34 Vict. C. 90)only becomes effective in places outside the United Kingdom upon being proclaimed. (See Halsbury's Laws of England Vol. XXX p. 467). It is true that ~~xx~~ there is some difference between the extension of an Act and the operation of an Act. The expression "extends to" is sometimes confused with 'come into force' and the expression' to extend' is sometimes used where 'to apply' would be more suitable. An Act could not come into force in any area to which it did not ~~xxxxxxxxxxxxxx~~ extend, but it might not be in force in an area to which it actually extended (see p. 167 of the General Clauses Act). What is therefore necessary is that an Act should be extended to and brought ~~xxx~~ into force in any area before it is considered to be operative there. Either of them may be provided for by the legislature itself and the other left to the executive authority. (See for instance the Transfer of Property Act; Administrator Generals Act, 1913, Agriculturists' Loans Act, 1884; Indian Bar Council's Act, 1926).Certain Acts provide for their extension to the whole of India with power to prohibit their application to certain parts (see the Charitable and Religious Trusts Act, 1920). In cases where an Act provides for its immediate operation with power to the executive to apply certain provisions to any area by a notification,

cation, as soon as a notification is issued accordingly, those provisions would be come operative in such local area. Would ~~it~~ not such a notification fall under clause 21 of the General Clauses Act ? According to the Govt. of India it appears that it would fall. If so, would not the cancellation of such notification amount to suspension of these statutory provisions in that local area ? It appears therefore very difficult to make any distinction between a notification applying an Act and a notification extending an Act for purposes of applying the provisions of sec. 21 of the General Clauses Act.

Sub-sec. (2) of sec. 1 of the Bombay Sales Tax Act, 1939 provides that it shall extend to the whole of the Province of Bombay and under sub-sec.(3) power is given to the Provl. Govt. to direct by notification in the official Gazette that all or any of the remaining provisions of this Act in respect of all or any of the items in the schedule shall come into force on such dates as may be specified in the notification. By a notification No. 2847/33-A, dated 19-5-39 Govt. directed that in respect of item 2 in the schedule to that Act the provisions of secs. 2, 6, 7, 8, 9, 13, 14, 15, 16, 17, 19, ~~12~~ 20, 21, 22, 23, 25 and 26 of the said Act should come into force on 1-6-1939. Thereafter the question arose whether that notification could be cancelled. In his No.1505, dated 8-2-1940 the R.L.A. held that

that the notn. could be cancelled.

Sub-sec.(1) of sec.2 of the Bombay Lifts Act, 1939 provides that it shall extend to the whole of the Province of Bombay and under sub-sec. (2) power is given to Govt. to bring the Act into force by a notn. The Act was accordingly brought into force and about 27 days thereafter Govt. thought of cancelling the notification and of issuing another notification bringing the Act into force with effect from a subsequent date. In his opinion No. 5883, dated 28-6-1940 the R.L.A. opined: "It does not however appear that sec. 21 of the General Clauses Act will apply in this case in as much as the power to bring the Act into force under s. 2(2) of the Bombay Lifts Act, 1939 has been duly exercised and therefore has been exhausted. Twenty seven days have elapsed since the said Act was brought into force and it would not be legally in order now to state that it shall come into force on the 1st day of July 1940. Besides, the proposed notn. would give rise to difficulties in respect of any rights acquired or liabilities incurred under the said Act and the rules made thereunder". I would agree that the proposal was fought with many difficulties; but I doubt whether the notn. immediately after it was issued was spent up (vl.sec sec. 6 of the General Clauses Act which was inserted by Act XIV of 1936 to remove all doubt about the repeal of an amending Act)..

The Bombay (Emergency Powers) Whipping Act is an emergency legislation and is intended to be brought into force when an emergency arises. The

difficulties pointed out by the R.L.A. in his last opinion may not arise in this case. I think it would not be wrong to apply section 21 of the General Clauses Act to notifications issued in the present case.

Id/-------16/9

A.C.R. Before expressing an opinion, I should like to have DS's views on paper. I am not quite sure if I have grasped his objections.

Id/------17/9

D.S.

I have no objection to being bound by the opinion that RLA holds on. A branch noting. I wish to know however if the opinion of RLA's former opinion No. definited over rules R.L.A's 5883 dated 28-6-40. I wanted to put this on paper, but As to whom I spoke said, I need not do so, but that he would note. As may be referred to as to this. A branch noting had not considered RLA's former Opinion until I raised the point.

2. The word "emergency" need not frighten us. Press Emergency Powers Act is a permanent measure, not temporary. Or take the Bombay Special Powers Bill, the measure is permanent till repeated, but the powers are exercisable temporarily in view of Clause 3(1)(b) and (3) of the Bill.

3. If an Act is put out of force and its running ended, if amounts to repeal. Legislation must normally repeal, not notification. Extent and application are quite different. I take a statutory example: ~~An~~

An Act extends say to British India, <u>but</u> can be applied to any Province on a notification by that

Province. Here unless the Act first extended to a particular Province, that Province cannot issue a notification. Mere extent would not however bring the Act into operation in the Province, unless that Province issued the notification of application. This notification can be cancelled, so that the application goes, but the Act remains and extent remains Operation necessarily goes with the application, but not as a result of repeal. Repeal puts puts an end to the Act itself, just as commencement brings it into life. If commencement is to be by notification, the Act has no life till a date is fixed by the notification. Once the dato is fixed, the Act is alive, and cancellation of the commencement notification would not mean that the Act was not alive on the date named. If it cannot mean this, I doubt if it would mean that the Act died on the date of cancellation. The notification can only fix a date; that is done once; and thereupon Govt. is functus officio as to commencement. If power is sought to give life to an Act and put life out of it as often as Govt. chooses to notify, this must be provided for by a special section for the purpose. (See examples under heading D at p. 196 (of Appendix V of) the annotated General (Causes Act.)

4. It would be useful to discover if in the past any Act has been put an end to by cancellation of a commencement notification. I am not aware of such notification.

5. I affirm that I do not wish to detain the issue of RLS's reply. The points I raised were raised on 12-9-42, & AS. took the file. AS. put it up on 16-9-

42. Since R.L.A. has signed the reply, I think it is pointless for me to detain the case further. I therefore take it that R.L.A.'s No.5883 dated 28-6-40 is now overruled.

Id/----------17/9

ALR.

I agree with A.S. regarding the present opinion.

Prima facie the present case would appear to full within Sect 21 of the General Clauses Act.

The Act is in effect an act to empower the Provincial Govt. to make certain offences punishable with whipping. It is in force from the moment it is enacted. Notifications under Sect 2(2) do not bring the Act into force but merely section 3. Cancellation of those notifications would not mean repeal of the Act.

The opinion of 28-6-40 can thus be distinguished for the present case. There the Act said that the Act unto come into for on Govt. notification. I therefore think it is unnecessary to decide whether the opinion of 28-6-40 was correct or not & it need not be regarded as overruled.

The opinion of 28-6-40 ought to have been considered by office & I did not realise all there was to the present opinion until D.S.O.A.S. reconsidered it.

I think the present opinion is correct. I can be distinguished for the former, whether that opinion is right or ~~xx~~ wrong. If D.S. agrees, the opinion may issue, I think in R.L.A's absence.

R.S.H. 18/9

No. Only sections 1, 2, & 4 are in force from the moment of enactment, but from such date as may be specified in a notification. Such ~~Sect~~ is the language of the commencement section in the Act, namely section 2.

Id/-----

I do not think D.S. has properly grasped A.L.R.'s meaning.

Id/--------

D.S.

The distinction pointed out by A L R rests on shaky ground. Repeal of a section cannot be affected without legislation any more than repeal of an Act. The ~~correct~~ Current opinion both here and in the G & L is that considerations regarding repeal of Acts includes those regarding repeal of enactments i.e. separate sections of an Act; Cf. section 24 of the General Clauses Act. That section has been applied in practice to scores of cases where not an Act but a section only of the Act was repeated and re-enacted (e g. Workmen's Compensation and Factories Acts.) We must therefore either hold that ~~RLA~~ RLA's opinion of 28-6-40 is overruled, or else revise the present opinion. That is my view.
On a point of detail, I think the present view is wrong and RLA's former opinion is correct; in other words, I take the language of section 2 (2) We mean that the legislature thereby gave Govt. this limited power to appoint a date for any area in respect of the commencement of the particular enactment, namely section 3, but not the further to repeal that section in its application to that area. That is the distinction between an application notification and commencement notification. But R L A may have his own view, and unless ALR thinks it necessary to have the matter specially addressed to RLA's notice, the opinion may issue under ALR's signature for RLA.

Id/---------
19/9

ALR.

I think RLA should see ~~xx~~ on Monday.

I have marked it immediate.

Even if the present opinion is issued, I think the question of the correctness of 28-6-40 should be referred to the A.G.

Id/-----
19/9.

D.S.

Id/-----
19/9.

RLA.

I think DS is wrong. In relying upon an American author, he seems to have lost sight of the full implications of sec. 21 of the General Clauses Act. I agree with AS & AER that RLA's opinion of 28-6-40 is clearly distinguishable on facts and it is not therefore necessary to overrule it.

Reply as signed issue today.

Id/-----.
21/9.

BKS. 9/4.

Legal Department
D Branch.

Submitted.

Section 3 ofthe Bombay (Emergency Powers) Whipping Act, 1941 Bom, XI of 1941 has been brought into force in the City of Bombay with effect from 11-8-42 vide G.N., H.D. No.4032/4-II, dated the 11-8-1942. It may be stated that section 3 of the Act was brought into force in the City of Bombay with effect form the 29th May 1941-Vide G.N.,H.D. No. 4932/4-I, dated the 30-5-41. It is not clear whether the application of the section from 30-5-41 was for a temporary period and if so when it expired. Perhaps the H.D. may see u.o. for remarks.

R.V.V.
13/8/42

S.S. It appears to be a case of an obvious oversight.

Id/-M. H.M.G.
13/8.

S.A.S. The notification was superfluous. Cancellation might create a wrong impression in the mind of the public. The best course appears to be to take no action.

Id/-S.B.P.
13/8.

D.S. I agree with S.A.S. but H.D. should see for future guidance.

Id/ H.K.D.
13/8.

U.O.N. To H.D. 6596 dated 14/8/42.

Home Department.

G.N.,H.D., No.4632/4-II, dated the 11th August 1942, was issued under oral instructions from Secretary. The point whether that Notification was necessary in view of the previous notification of 1941 referred to by L.D. at 'A' overleaf was not considered.

A copy of the L.D. note may be kept in this Department, and these papers may be returned to that Department.

Sd/-

20-8-42.

D.S. Id/- 20/8/42.

Resubmitted with ref. to D.S's marginal note above.

2. Please see the Bombay (Emergency Powers) Whipping Act, 1941, at p. 13 of file No. 4632/4-II put up below.

It is obvious from the title of the Act, that the Act is to be used incase of emergency only. However, there is nothing in the Act to show that if once the Act is extended to a particular area by a notification issued under section 2(3) of that Act, that notification will cease to have effect after the emergency expires. It therefore appears that once the Act is extended to a particular area, the Act remains in force in that area, till the notification is cancelled and no fresh

notification is ~~xxxxxxxxxxxxxx~~ necessary as far as that particular area is concerned. As the notifications now issued (and that issued in 1941) do not fix any period for which they are to remain operation, no fresh notification would be necessary in future for the extension of the Act to the Bombay City and Poona District. It would perhaps be advisable to cancel the notifications when the present emergency is over. In that case, a fresh notification will be necessary, should an emergency arise again.

Sd/-
29/8/42.
D.S.

It was the intention of Govt. I think that this should be applied only during emergencies.

Does the power to notify that the Act extends to a particular area include the power to denotify and terminate such extension? If so, we can, secure the object in view by denotifying when ever emergencies are over.

Otherwise the Act must be amended.

Will the L.D. please advise.?

Sd/-S.G.B.
29-8-42.

n.o.r to L.D. dt. 29-8-42.

See H.L.A's opinion No. 7801 dated the 21st September 1942.

H.D.

Submitted for information, with reference to the Dy. Secretary's note at p.3 ante.

D. These papers may be kept on H.D. records.

if L.D. agrees.

Sd. P.C.C.
23/9/42.

Dy. Secy. S.C.D.

u.o.r. to L.D. dated 24-9-42.

L.D.

Submitted.

2. As desired by the H.D. these papers may be sent to them after keeping copies of all the notes on our record. All the notes should be filed along with the R.L.A's No. 7601 dated 21-9-42.

Id/- S.U.D.
25/9.

S.S. Id/- K.M.G.
25/9.

P.A. Id/-S.L.C.
28/9.

U.D. to H.D., No. 7857 dated 28-9-42.

D.K.S. 7/4.

DG.K.